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IN THE

Supreme Court of the United States

THE SHERRY CORINE CORPORATION,
Petitioner,

vs.

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Respondent.

To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Your petitioner, The Sherry Corine Corporation, is a corporation organized and existing under the laws of the State of Virginia, wherein it is engaged in the local retail restaurant business. Your petitioner prays that a writ of certiorari issue to the United States Court of Appeals, Fourth Circuit, to review a judgment of that Court entered in a case entitled "James P. Mitchell, Secretary of Labor, United States Department of Labor vs. The Sherry Corine Corporation, Docket No. 7784", reversing a judgment for the petitioner rendered by the United States District Court For The Eastern District of Virginia, Norfolk Division (Albert V. Bryan, District Judge) and ordering that the case be remanded for further proceedings in accordance with its opinion.

OPINIONS BELOW

The Opinions rendered by the District Court and by the Court of Appeals, Fourth Circuit, have not as yet been officially or unofficially reported. Copies of these Opinions are included in the appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC, Section 1254 (1). The judgment of the Court of Appeals for the Fourth Circuit was entered on March 13, 1959.

QUESTIONS PRESENTED

1. WHETHER A LOCAL RETAIL RESTAURANT PREPARING COMPLIMENTARY FLIGHT MEALS FOR CONSUMPTION BY AIRLINE PASSENGERS IS SUBJECT TO THE PROVISIONS OF THE FAIR LABOR STANDARDS ACT?

2. WHETHER A LOCAL RETAIL RESTAURANT PREPARING COMPLIMENTARY MEALS FOR CONSUMPTION BY AIRLINE PASSENGERS IS EXEMPT FROM THE ACT AS A LOCAL RETAIL ESTABLISHMENT?

STATUTE INVOLVED

The provisions of the Fair Labor Standards Act pertinent to the questions presented by this Petition are as follows:

"Sec. 3. As used in this Act——

"(i) 'Goods' means goods (including ships and marine

equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the producing thereof, in any State."

Section 13 (a)—The provisions of Sections 6 and 7 shall not apply with respect to:

"(1) * * * * * * * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry***"

STATEMENT OF THE CASE

The petitioner, The Sherry Corine Corporation, is a family owned corporation, organized and existing under the laws of the State of Virginia and having its principal and

only place of business in the City of Norfolk's Municipal Airport Building, located in Princess Anne County, Virginia. The business conducted by the petitioner is a local retail restaurant. (Factual finding by District Court). The corporation has two operations in the airport building, one known as the Municipal Airport Grill, being located on the first floor and the other known as the Azalea Room Restaurant, being located on the second floor of said airport building. The grill operation is carried on in one small room with work space in the center and customer counters surrounding said work space. All sales are retail sales and the grill is the only grill at the airport.

The Azalea Room Restaurant is an attractive restaurant ovrelooking the main runways and loading stations of the airport. Adjacent to the dining areas is an adequate kitchen where food is prepared for sale in the Azalea Room and also where meals are prepared on a per meal basis for sale to the Capital and National Airlines for use as complimentary meals on their passenger flights.

Petitioner has 45 employees, among whom are cooks, waitresses, cashiers and kitchen help in the grill and Azalea Room, and, also, "bus" boys, who deliver the meals prepared in the Azalea Room kitchen to the airplanes, some 75 to 100 feet away.

Petitioner, among its other activities in the Azalea Room Restaurant, periodically furnishes a meeting and dining place for various social, fraternal, business and professional organizations. Petitioner regularly prepares banquets for 75 to 250 members of such organizations. Such meals are handled on a "standard" meal basis (as distinguished from a la carte orders) and are billed on a per meal basis.

Petitioner also prapares from time to time food on a multiple meal basis for service at banquets held at the Masonic Temple in the City of Norfolk. On such occasions, the utensils of the Masonic Temple are used and are cleaned by the petitioner. Once a year the petitioner prapares 4,000 box lunches for participants in the Annual Oyster Bowl Football Parade and Game for Crippled Children. These box lunches are prepared and charged for on a unit basis.

Petitioner first made sales to the airlines in 1951. However, from 1951 to 1955, the only items sold to the airlines were coffee and juice. The petitioner's operation is so small the airlines did not at first think it was suitable as a "food point" on their flight schedule. During the years that the petitioner sold no meals to the airlines, the business in the Azalea Room flourished as there was no other restaurant facility available to passengers boarding or disembarking from planes. However, as soon as the petitioner commenced selling meals to the airlines and Norfolk became a "food point" on the airlines' schedule, petitioner's Azalea Room Restaurant business declined drastically as potential customers ate the meals furnished to the airlines.

Petitioner has no written or oral contract with the airlines to furnish food. The only arrangement between the parties is that if the petitioner accepts the airlines' daily request for a specified number of meals, then such meals are to conform to a designated menu and are to contain the quantity and quality of food designated for the per meal price specified. But the airlines are not obligated to buy from the petitioner, and it is not obligated to sell to the airlines. Either party may cease doing business with the other without prior notice.

The volume of petitioner's sales to the airlines depends entirely upon weather conditions, holiday schedules, flight schedules, etc. The record indicates that at the time of trial petitioner was furnishing food or beverages to approximately 15 flights a day, that is, meals for seven separate flights, and coffee and juice for eight other flights. The food on each of these flights is served to passengers who are aboard the plane when it leaves Norfolk.

It is stipulated that 46 per cent of petitioner's gross business for calendar year 1956 and 49 per cent of its gross business for the calendar year 1957 were derived from food sales to the airlines.

Petitioner charges and receives a retail price for all food and beverages sold to the airlines. Petitioner has consistently refused to sell to airlines who "resell" such food and beverages to their passengers. All food and beverages sold by petitioner has been to airlines who give the food to their passengers as a "complimentary" meal, and advertise such in their flight schedules and other advertising media.

The petitioning corporation is a retail sale and service restaurant, and is so recognized in the industry. The corporation holds a retail restaurant license from the Commonwealth of Virginia and is not subject to regulation by any state or federal agency having inspection supervision of wholesale restaurants or manufacturing concerns. All of petitioner's sales, both in the grill and in the restaurant, and its catering services to local civic and social organizations and groups, and its sales to the airlines are all retail sales for which a retail price is charged.

No employee of the petitioner is employed in work across state lines and no food prepared by petitioner is resold

in interstate commerce within or without the borders of Virginia. The sale and delivery of meals is completed in Virginia and immediate consumption in flights occurs in Virginia.

The same fare is paid by the airline passenger whether he travels on a meal flight or not. Petitioner's employees do not participate in flights and do not engage in activities essential to commerce. The meals involved are prepared and delivered as a perishable item intended for immediate consumption. The meals are not merchandise which is produced for commerce and for the purpose of resale. The airlines involved are not engaged in reselling meals unless it can be said, the airlines resells to the passengers the aspirin, magazines, toilet paper, pillows, etc., available on each plane for the price of the ticket.

This cause was heard on the Compaint of the Secretary of Labor of the United States seeking to enjoin the petitioner from alleged violations of the minimum wage, overtime, record keeping and shipping provisions of the Fair Labor Standards Act. The cause was heard ore tenus by the Court on March 3, 1958. The petitioner conceded in the District Court that, as it is a local retail restaurant corporation, it has never complied with the minimum wage, overtime, record keeping, or shipping provisions of the said Act. The petitioner contended below, and the District Court so found, that it is not engaged in commerce or the production of goods for commerce within the meaning of the Act; and, even if so engaged, is exempt by the provisions of Section 13 of the Act. See findings of fact and conclusions of law in the District Court's Memorandum dated June 19, 1958 and reproduced in full in the appendix.

The Court of Appeals reversed the judgment of the District Court and remanded the cause to the District Court for further proceedings, holding that petitioner was subject to the Act, and, though a local retail restaurant, was not entitled to the exemption provided by Section 13 (a) (2) of he Act.

The core of the reasoning by which the Court of Appeals arrived at the decision that the petitioner was covered by the Fair Labor Standards Act is contained in the following quotation from the Court's Opinion:

> "The initial question is whether the Corporation's kitchen employees and bus boys are 'in commerce' or 'in the production of goods in commerce' within the meaning of Section 6 of the Statute. It is generally held that employees engaged in producing goods for the instrumentalities in commerce, such as railroad and ships, are engaged in the production of goods in commerce."

The core of the reasoning by which the Court of Appeals arrived at the decision that the petitioner was not entitled to the retail exemption afforded by he Act is contained in the following quotations from the Court's Opinion:

> "Their meals are purchased by the airline not for self-consumption but for consumption by the passengers and although no separate specific charge is made, the cost is an operating expense taken into account in computing the rates of transportation. In some instances, moreover, meal service is an important factor which distinguishes first class flights from cheaper flights on which food is furnished only for an additional charge. The decisive factor, in our view, is that the meals are

purchased by the airlines to be distributed by them to individual passengers for consumption and that the airlines are compensated for the cost by making it a constitutent element for the charge for transportation. In a broad sense, it may fairly be said that there is such a resale as to exclude the transaction from the retail exemption of the statute."

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A DECISION OF THIS COURT.

The Court of Appeals has decided a federal question in a way that squarely conflicts with the decision of this Court in *McLeod v. Threlkeld, et al*, (1943) 319 US 491. In that case, this Court held the employees of an independent food contractor who furnished the ingredients and prepared meals on a railroad dining car for consumption by maintenance of way employees of an interstate railroad was not covered by the Fair Labor Standards Act for the reason that the employees were neither engaged in the production of goods for commerce nor engaged in commerce.

The District Court in the present case found that the Threlkeld case was controlling.

The Court of Appeals, however, held that the mere fact that an instrumentality of interstate commerce purcased the goods (meals here) for in transit consumption by its passengers is sufficient to constitute production of goods for commerce under the Fair Labor Standards Act. Such a holding squarely conflicts with the decision of this Court in the case of *McLeod v. Threlkeld*, supra.

2. THE COURT OF APPEALS HAS DEFINED "RESALE" AS USED IN SECTION 13 (a) (2) OF THE FAIR LABOR STANDARDS ACT IN A WAY THAT IS IN CONFLICT WITH THE DEFINITION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The decision of the Fourth Circuit in this cause is in conflict with the decision of the Fifth Circuit in the case of *Ben Kanowsky, Inc. v. Arnold*, (CCA 5th) 250 Fed. (2d) 47, certiorari granted May 4, 1959.

One of the essential elements of the retail exemption afforded by Section 13 (a) (2) of the Fair Labor Standards Act is the proper definition of "resale" as therein used. The Act does not define resale, and, therefore, it must be given its usual meaning and connotation as used in sales parlance.

The Fifth Circuit in the *Ben Kanowsky* case gave the word "resale" its usual and customary meaning when it said:

> "The word *retail* is not defined by the Act. Given its common and ordinary acceptation when used in sales parlance, it means a sale in small quantity or direct to the consumer, as distinguished from the word *wholesale*, meaning a sale in large quantity to one who intends to *resell*. The character of the sale is not altered by the use to which the consumer may put the purchased commodity. These sales were prepondreantly retail although the products sold were used subsequently for commercial purposes." (Italics supplied).

This definition was adopted by the District Court in the instant case and your petitioner was afforded its retail exemption. The testimony was uniform and conclusive that the sales here involved were not sales for resales in the

restaurant industry. The District Court's action was in accordance with the House Conferee Report as to the applicability of the exemption to restaurant establishments even though located in interstate facilities.

"Statement of House Conferees, 1949 Amendment:

Retail and Service Establishments:

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. * * *

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or both) must be recognized in the particular industry as retail sales or services. Under this test any sale or service, regardless of the type of customers, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail or service. * * * Likewise, sales or services of hotels, *restaurants* * * * filling stations and the like, whether made or rendered to private householders or to business customers, will be retail so long as they are recognized as retail sales or services in such industries.

"The location of the establishment, whether in an industrial plant, an office building, a *railroad depot*, or

a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act."

See *Mitchell v. Kentucky Finance Company*, (CA 6), U.S., (Decided April, 1959, reversing 254 F. (2d) 8).

The Fourth Circuit, however, rejected the rationale that the word "resale" must be given its common and ordinary acceptation when used in sales parlance, and held that meals purchased and paid for by the airlines as a business expense are "resold" to the passengers within the meaning of Section 13 (a) (2) of the Fair Labor Standards Act. The Court reached this conclusion regardless of the factual finding that the meals are "complimentary", as the passenger does not pay for the meal as a separate charge. Items used by a customer and purchased by the establishment as a business expense have never been deemed to be "resales" in sales parlance. See *Robertson Products Co. v. Nudelman*, (Ill. 1945) 59 NE (2d) 655; *Fefferman v. Marolin*, 97 NS (2d) 785; *Hotels Statler Co. v. D. C.*, 199 F (2d) 172. Thus, the decision of the Fourth Circuit not only is in conflict with the rationale of the *Ben Kanowsky* case, which is presently pending before this Court; it also constitutes a tortured definition of the word "resale", the critical criterion of exemption under Section 13 (a) (2) of the Fair Labor Standards Act. Such definition of "resale" is also in direct conflict with the definition adopted by every court which has had the question before it in whatever context.

The 1949 Amendment was tailored to overcome the Administrator's "business use" test, which determined that

a sale for use for a commercial purpose could not be a retail sale. In *Walling v. Roland Electrical Co.*, (CA 4) 146 F (2d) 745, cert. den. 326 US 657, the Fourth Circuit accepted the Administrator's holding that the sale for a commercial use is not a retail sale. The House Conferees, in their report on the 1949 Amendment, specifically noted that the case of *Walling v. Roland Electrical Co.*, supra, was overruled by the 1949 Amendment. In the instant decision, the Fourth Circuit has apparently disregarded the purposes of the 1949 Amendments, and has reaffirmed its previous decision in the Roland Electrical Company case by holding that a sale for commercial use is a sale for resale within the meaning of the Amendment.

The government conceded in the Fourth Circuit that the Petitioner had established the other grounds essential to the claiming of exemption afforded by Section 13 (A) (2) of the Fair Labor Standards Act: namely, (1) that "more than 50 per centum" of petitioner's "annual dollar volume of sales of goods or services is made within the State in which the establishment is located", and (2) that 75 per centum of petitioner's annual dollar volume of sales of goods and services "is recognized as retail sales or services in the particular industry". The sole question presented, therefore, is whether or not petitioner's sale of meals to the airlines are sales for resale within the 1949 Amendments to Section 13 (A) (2) of the Fair Labor Standards Act. By its decision the Fourth Circuit has defeated the ends sought to be accomplished by the 1949 Amendments by holding that a sale for a commercial use (as distinguished from a personal or private use) is a sale for resale and thus not a retail sale.

Thousands of restaurant operators throughout the United States have deemed themselves exempt under Section

13 (a) (2) of the Fair Labor Standards Act who will now be covered if this decision is allowed to stand. The applicability of such a definition of "resale" is not restricted in its affect to the restaurant business. Retail businesses of every nature (which have never considered a legitimate business expense to be a "resale" of the service rendered) will now find they are subject to the Fair Labor Standards Act. This will result regardless of the local, retail nature of the business.

Petitioner's business has been literally destroyed over night by this definition of the word "resale" and its sole remedy is to urge upon this Court that the correct definition be announced by this Court so that this important federal question can be settled.

CONCLUSION

It is respectfully submitted that this Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit should be granted.

ROBERT R. MACMILLAN
Counsel for Petitioner

BREEDEN, HOWARD & MACMILLAN
612 National Bank of Commerce Building
Norfolk 10, Virginia

May 28, 1959

Exhibit "A"

IN THE
UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

CIVIL 2526

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor

v.

SHERRY CORINE CORPORATION

MEMORANDUM BY THE COURT

Although the defendant furnishes meals to passengers aboard interstate airliners, the court is of the opinion that the defendant is not subject to the Fair Labor Standards Act because the defendant is a localized restauranteur engaged in a purely local operation. Besides, the business is exempt from the Act as retail, retail characterized by the customary readiness of the counter or table to the patron and of the service of food not needing further processing and not intended for preservation. 29 USCA 206, 207, 213 (a) (2).

I. Defendant conducts a grill as well as a more formal dining room at the Norfolk, Virginia municipal airport, serving anyone who presents himself. Without a contract

with the airlines, it accepts their daily requests for each flight for meals of a specified menu and at a fixed price. There is no standing obligation between them to buy or sell. The number of meals for the flights varies from one to fifty-five—not as many as the defendant will frequently serve to a civic club or other group.

Instead of deplaning the passengers and faring them in the grill or dining room, the airline has the meals brought to them, but the same meals exactly. The food is for immediate eating; it is not simply the constituents of a meal to be thereafter prepared. "Bus" boys of the defendant deliver the meals in individual trays (owned by the carrier) to the side of the ship, in lieu of waiters setting them on tables before the guetss. In return, the boys receive from the planes similar but soiled utensils for washing. Althought touching it, the defendant's activities are not steps either pre-, or of, inter-state commerce. McLeod v. Threlkeld 319 U.S. 491, 493 (1943).

II. But, in any event, the employees of the defendant are exempted from the Act by Section 13 (a)(2) in these words:

> "(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dolar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." 29 USC \ 213 (a) (2).

As initially noted the features of the defendant unmistakably mark it a retailer whose scope of action is clearly local. The defendant is so classified "in the particular industry" of which it is a part, and is so assessed for State license taxes. It meets, too, the other exactions of the statute's formular for retail exemption.

"More than 50 per centum of xx [its] xx annual dollar volume of sales of goods or services is made within the State" of its location, admittedly. If the sales to the airlines are not "for resale", then indisputably "75 per centum" of its total annual sales in dollar volume are not "for resale". The court concludes they are not, in law, sales for resale.

True, the cost of the meals is an operating expense; it is borne by all passengers, whether or not receiving a meal, in the purchase of their transportation. If this be a "resale" is is, as to those passengers who are furnished a meal, surely too tenuous to be real—too removed and too diluted to alter the nature of the defendant's trade. The stark actualities of the defendant's method of doing business are not erased by the reimbursement of the carrier by the passenger. It still remains, as originally, a chef-to-guest service, the character of the vendor unchanging. The status of a taverner is not affected by who picks up the chit.

Nor is the retail cast of defendant altered by the fact that its meals were sold for use in a commercial enterprise. Defendant's operations are nonetheless local and immediate with the consumer. But, more, since the 1949 amendment of the Act, such a commercial use no longer destroys the retail form of the sale; it is no longer a factor in the dermnination of the statutory exemption. By this change Congress emphasized that "xxx sales or services of xx restaurants xx

whether made or rendered to private householders or to business customers" should be considered retail. See Conference Report No. 1453, October 17, 1949, 81st Congress, First Session, U. S. Congressional Service, p. 2241, 2263-5.

III. Allied to both points just discussed is the further consideration that in the circumstances defendant's operation does not involve goods or services within the Act. The meals furnished are, by statutory definition, excluded as "goods" for, as we have noted, they are delivered almost directly "into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof". 29 USCA 203 (i). There is no service unless the subsequent washing of the dishes on which the meal has been put be a service. But dishwashing is a service at once connected with the meal, a nact integral in the provision of meals to every kind of patron. That the dishes belong to the airlines is not significant. Without stepping out of character, a licensed victualer may fill, rinse or wash the lunch pail, the picnic jug or the family plate of his patrons.

Adopting this memorandum as its findings of fact and conclusions of law, the court is now entering an order denying an injunction and directing dismissal of the complaint.

(Sgd.) ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
June 19th, 1958.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
AT NORFOLK

CIVIL 2526

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor

v.

SHERRY CORINE CORPORATION

FINAL ORDER

Upon the findings of fact and conclusions of law, stated by the court in writing and this day filed, it is

ORDERED that the injunction and other relief prayed in the complaint in this action be denied, the said complaint dismissed and this action stricken from the docket, all of which is hereby done.

(Sgd.) ALBERT V. BRYAN
United States District Judge

Alexandria, Virginia
June 19th, 1958.

Exhibit "B"

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 7784.

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Appellant,

vs.

SHERRY CORINE CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
ALBERT V. BRYAN, DISTRICT JUDGE.

(Argued January 20, 1959. Decided March 13, 1959.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Sylvia S. Ellison and Beate Bloch, Attorneys, United States Department of Labor, (Stuart Rothman, Solicitor, and Bessie Margolin, Assistant Solicitor, United States Department of Labor, on brief) for Appellant, and Robert R. MacMillan (Breeden, Howard & MacMillan on brief) for Appellee.

SOPER, Circuit Judge.

This action was instituted by the Secretary of Labor under the Fair Labor Standards Act, 29 U.S.C. Supp. IV, Sec. 201 et seq., to enjoin the Sherry Corine Corporation from violating the minimum wage and related sections of the statute at the restaurants which it operates at the Municipal Airport in Norfolk, Virginia. The defendant contended that its employees were not covered by Secs. 6 and 7 of the Act since they were not engaged in commerce or in the production of goods for commerce, as defined in Sec. 3 thereof, and also because the business was a retail of service establishment within the meaning of Sec. 13 of the Act. The District Judge sustained these defenses and dismissed the complaint.

The Corporation operates a coffee shop on the first floor and a dining room and kitchen on the second floor of the airport building. It employs 45 persons, including a chef, 2 assistant chefs, 10 helpers and 10 bus boys. In addition to the patrons of the two restaurants, it regularly supplies meals to Capital Airlines and National Airlines to be served to their passengers enroute on flights leaving Norfolk for destinations outside the State of Virginia. This business produces bewteen 46 per cent and 49 per cent of the Corporation's annual gross revenue.

The Capital Airlines purchases meals prepared according to its specifications at an agreed price for three of its sixteen flights leaving Norfolk each day. It notifies the defendant three hours before flight time how many meals will be required but reserves the right of cancellation one and a half hours prior to time of departure upon payment of half price. An hour before flight time the restaurant

prepares the required number of trays, eight to a carrier, placing upon each tray the necessary accessories. Hot foods prepared in the kitchen in casserole dishes are kept hot in electric ovens. This equipment is the property of Capital Airlines. The trays and ovens are delivered to the planes and put in place by the defendant's bus boys twenty minutes before departure. Empty ovens, carriers and soiled equipment are removed from the plane and cleaned in defendant's kitchen. The airlines hostess aboard the plane serves the passengers after the plane has reached cruising height, and generally the meal has not been served and eaten until *after the plane has left the State.* In the case of one flight, service is not commenced until the plane has made its first stop in North Carolina. Southbound and westbound flights cross the State's borders in eight to twelve minutes; northbound flights in twenty-four to thirty-five minutes. The planes carry from twenty-four to fifty-seven passengers. The defendant also provides coffee and fruit juices for other flights, and special cleaning service for planes from out-of-state that stay in Norfolk overnight. The defendant's arrangement with National Airlines is similar in all material respects to its arrangement with Capital Airlines.

The airlines serve meals on certain first class flights without specific additional charge. This practice has been a competitive factor in air transportation. The expense is recognized as part of the cost of operation which enters into the authorized rate structure. On cheaper flights the Civil Aeronautics Board does not permit the furnishing of meals except for a charge over and above the cost of the ticket. The airlines are not under contract to furnish complete meals but the passengers have come to expect them, and sometimes when a flight is delayed meals are served to them in

defendant's restaurant at the airport at the expense of the airline.

The initial question is whether hte Corporation's kitchen employees and bus boys are "in commerce" or "in the production of goods in commerce" within the meaning of Sec. 6. (a) of the statute. It is generally held that employees engaged in producing goods for instrumentalities in commerce, such as railroads and ships, are engaged in the production of goods in commerce. Thus, in *Hamlet Ice Co. v. Fleming*, 127 F. 2d 165, we held that workmen engaged in producing ice for sale to an interstate railroad for use in icing perishable freight, as well as food and beverages in dining cars, were covered by the statute. And in *Allstate Construction Co. v. Durkin*, 345 U.S. 13, the Supreme Court held that employees of a manufacturer who produces a road surfacing mixture for use in the reconstruction and repair of interstate roads are engaged in the production of goods for commerce. See also *Atlantic Co. v. Walling*, 5 Cir. 131 F. 2d 518; *Chapman v. Home Ice Co.*, 6 Cir., 136 F. 2d 353, cert. den. 342 U.S. 814; cf. *Ben Kanowsky, Inc., v. Arnold*, 5 Cir., 250 F. 2d 47. In *Armstrong Co. v. Walling*, 1 Cir., 161 F. 2d 515, it was held that workers in a commissary department, which served as a kitchen and storeroom for selling counters of sandwiches and milk in a railroad station, and also for the service of like articles on trains, were engaged in the production of goods for commerce; and in *Mitchell v. Royal Baking Co.*, 5 Cir., 219 F. 2d 532, it was held that employees of a bakery who furnished meals to cafeterias, which used them in the preparation of flight meals sold to airlines for use on planes, were similarly engaged. These decisions have not been deemed at variance with *McCleod v. Threlkeld*, 319 U.S. 491, where it was held that

an employee who prepares meals for maintenance-of-way employees of an interstate railroad, under a contract between his employer and a railroad company, is not engaged in commerce within the meaning of the statute.

In opposition, the defendant contends that the case falls within the exception contained in Sec. (3) (i) of the Act to the effect that the term "goods" does not include "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof." The activities of the employees of the defendant who deliver the constituents of the meals to the side of the ship for consumption by the passengers is likened to the service of waiters in the restaurant who set meals on tables before the guests.* The evidence shows, however, that the meals are not furnished to the passengers by the defendant but by the airlines. Moreover, the arrangement not only serves the convenience of the passengers but also facilitates the interstate operations of the airlines by obviating the delays incident to the service of meals at the airport. In most instances the meals are consumed during flights from Virginia to neighboring states and it is of no consequence that they are delivered to the planes before the interstate movement begins. In *Powell v. U. S. Cartridge Co.*, 339, U.S. 497, contractors producing munitions for the United States claimed that their product were excluded from coverage by Sec. 3 (i) because they were delivered to the United States, the ultimate consumer, prior to interstate transporation, but the Court overruled this contention in these words (pp. 514-15):

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*cf., *Dial, et al v Hi Lewis Oil Co.*, D.C. Mo. 1951, 99 F. Supp. 118.

"We hold, therefore, that the fact that the munitions were produced for delivery into the actual physical possession of the United States as their ultimate consumer, before their subsequent interstate shipment, does not deprive the employees who produced the munitions of the benefits of the Fair Labor Standards Act. It is not material whether such interstate transportation was to take place before or after the delivery of the munitions to the United States. In either event, the employees were engaged in the production of 'goods' for 'commerce'. To hold otherwise would restrict the Act not only arbitrarily but also inconsistently with its broad purposes."

The defendant, however, strongly contends that even if the meals constitute goods produced for commerce, the employees of the restaurant engaged in preparing them are expressly excluded from coverage by Sec. 13 (a) (2) of the Act relating to employees of a retail establishment, which is defined as "an establishment, 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." Since the sales to the airlines constitute 46 per cent of the defendant's business this contention is not tenable unless it appears from the evidence (1) that the meals are not furnished to the airlines for resale anl (2) that the sales are recognized as retail sales within the particular industry. The District Judge found, on the basis of substantial and uncontradicted evidence, that the defendant's operations, including its airline sales, are recognized in the industry as retail sales, and hence he held that the second component in the basis of the exemption had been establishel. The Government on its part does not

consider or discuss the evidence bearing on this point but relies on the contention that the arrangement amounts to a sale of goods for resale and therefore falls outside the statutory exemption.

The principal basis for the defendant's contention that the goods are not furnished to the airlines for resale is that a specific saparate charge is not made for the meals; and that they are furnished to the passengers as a complimentary service in much the same way as free hotel accommodations and limousine service are provided when flights are delayed. Since the fare charged between two points is the same whether or not it takes place at meal time, which constitutes about one-third of flight time, it is said that the meals constitute a gratuity, which is justified by the saving of expense that would be incurred by the airlines if their flights were delayed by waiting at a terminal while the passengers were at their meals in the restaurant.

In addition, our attention is called to the operations of the catering business where food is served in large quantities at receptions, banquets and conventions, and the transactions are regarded as retail sales of goods to be consumed and not resold; and again the sales under consideration in the instant case are likened to the sales of such articles as soap, towels, paper cups and so forth; to hotels to be furnished to guests free of charge, in which situation it has been held that there is no resale of the articles to the guests although the cost of the goods undoubtedly enters into the charges for which the guests are billed. See *Hotel Statler Co. v. District of Columbia*, C.A., D.C., 199 F. 2d 172.

We do not think that these considerations give sufficient weight to the rule that this exemption in the Act is to be

narrowly construed and it is not to be applied to situations except those plainly within its terms and spirit. See *Phillips Co. v. Walling*, 324 U.S. 490-493. Obviously there is no resale of meals to the guests at a reception or to the members of an association when the food is bought by it with their funds for their consumption; and there is no practicable allocation of the cost of miscellaneous services of the kind described above rendered by a hotel to its guests as there can be in the case of meals bought for and consumed by a definite number of passengers embarked for a flight. Their meals are purchased by the airline not for self-consumption but for consumption by the passengers and although no separate specific charge is made, the cost is an operating expense taken into account in computing the rates of transportation. In some instances, moreover, meal service is an important factor which distinguishes first class flights from cheaper flights on which food is furnished only for an additional charge. The decisive factor, in our view, is that the meals are purchased by the airlines to be distributed by them to individual passengers for consumption and that the airlines are compensated for the cost by making it a constituent element for the charge for transportation. In a broad sense, it may fairly be said that there is such a resale as to exclude the transactions from the retail exemption of the statute.

The judgment of the District Court is reversed and the case is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

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No. 967

In the Supreme Court of the United States

OCTOBER TERM, 1958

SHERRY CORINE CORPORATION, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 965

SHERRY CORINE CORPORATION, PETITIONER

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 264 F. 2d 831. The District Court's opinion is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 13, 1959. The petition for a writ of certiorari was filed on June 1, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether employees preparing food and beverages for sale to commercial airlines to be served to their passengers en route on interstate flights are en-

gaged "in commerce" or "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

2. Whether a corporation deriving between 46% and 49% of its annual gross income from such sales of food and beverages to commercial airlines can qualify for exemption from the Act as a "retail or service establishment, * * * 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*), in addition to those set forth on pages 2 and 3 of the petition herein, are:

> SEC. 3. As used in this Act—
>
> * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: *Provided*, That the sale is recognized as a bona fide retail sale in the industry.
>
> * * * * *

STATEMENT

The Secretary of Labor brought this action to enjoin the petitioner from violating the minimum wage

overtime, record-keeping and shipping provisions (Sections 6, 7, 11(c), 15(a)(1) and 15(a)(2)) of the Fair Labor Standards Act. The petitioner admitted non-compliance with these provisions (Pet. 7), contended that its employees were engaged neither "in commerce" nor in "the production of goods for commerce" under the Act, and asserted that it was in any event exempt from the Act's requirements under Section 13(a)(2) as a "retail or service establishment."

The petitioner operates a dining room and a coffee shop in the Municipal Airport Building in Norfolk, Virginia, where it employs 45 persons, including a chef, two assistant chefs, ten kitchen helpers and ten bus boys (Pet. 21).[1] In addition to serving patrons in its two restaurants, the petitioner regularly supplies food and beverages to Capital Airlines and National Airlines to be served to their passengers enroute on interstate flights leaving Norfolk. This business produces between 46% and 49% of the petitioner's annual gross revenue (*ibid.*).

Flight meals are prepared according to the airlines' specifications, at an agreed price per meal, for meal flights indicated on schedules furnished to the petitioner. The airline notifies the petitioner three hours in advance of flight time how many meals will be required, reserving a right of cancellation upon payment of half price up to one and one-half hours before departure. About one hour before flight time, the petitioner's employees prepare the requisite num-

[1] This and subsequent similar page references are to Exhibit "B" (the opinion below) of the petition for certiorari.

ber of trays. Hot foods prepared in the kitchen are placed in casserole dishes kept hot in electric ovens. The trays and ovens are delivered and put in place aboard the plane by petitioner's bus boys twenty minutes before departure. Empty ovens, carriers and equipment, all the property of the airline, are removed from the plane and cleaned in the petitioner's kitchen. The airline hostess aboard the plane serves the passengers after the plane has reached its cruising altitude. Generally, service and consumption of a meal cannot be completed until after the plane has left the state. In the case of one flight, service is not commenced until after the plane has made its first stop across the state line. The petitioner also provides coffee and fruit juices for other flights, and special cleaning service for planes from out-of-state that stay in Norfolk overnight (Pet. 21–22).

The airlines serve meals on certain first class flights without specific additional charge (Pet. 22). This practice, inaugurated to avoid the delay and expense incident to landing passengers en route for a meal, has become a competitive factor in air transportation (Pet. 22, 24, 26). The airlines do not assume a strict contractual obligation to furnish meals, but passengers have come to expect them, and sometimes when a flight is delayed meals are served to them in the petitioner's restaurant at the airport at the airline's expense (Pet. 22–23). The expense of furnishing meals to passengers is recognized as part of the cost of operation which enters into the airlines' authorized rate structure. Meal service is an important factor which distinguishes first class flights from cheaper

flights, upon which the Civil Aeronautics Board permits food to be furnished only for an additional charge (Pet. 22, 27).

The trial court dismissed the complaint, sustaining the petitioner's contention of non-coverage and its claim to exemption as a "retail or service establishment" under Section 13(a)(2) of the Act (Pet. 15–18). The Court of Appeals reversed, holding that the petitioner's kitchen employees and bus boys are engaged "in the production of goods in commerce" (Pet. 23–25), and that the sales to the airlines (which constituted in excess of the 25% tolerance for non-retail sales) were sales for resale within the meaning of the exclusion from the retail exemption of the statute (Pet. 27).

ARGUMENT

The decision below is correct; it accords with principles well settled by the decisions of this Court; and does not conflict with decisions of any other court of appeals. The holding is so limited to a particular factual situation, involving relatively few employers and employees, that we do not believe it of sufficient general significance to warrant review by this Court.

1. In holding the petitioner's employees to be engaged "in commerce or in the production of goods in commerce", the Court of Appeals applied the rule stated by this Court in *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, that employees producing goods for instrumentalities of interstate commerce are engaged in the production of goods "for commerce" within the meaning of the Fair Labor Standards Act. Even prior to *Alstate*, coverage had been consistently

sustained for employees producing ice for use by interstate railroads in icing food and beverages in dining cars as well as perishable freight (*Hamlet Ice Co.* v. *Fleming*, 127 F. 2d 165 (C.A. 4), certiorari denied, 317 U.S. 634; *Atlantic Co.* v. *Walling*, 131 F. 2d 518 (C.A. 5); *Southern United Ice Co.* v. *Hendrix*, 153 F. 2d 689 (C.A. 6); *Chapman* v. *Home Ice Co. of Memphis*, 136 F. 2d 353 (C.A. 6), certiorari denied, 320 U.S. 761),[2] and to employees of a commissary producing food and other items for sale in railroad stations and on interstate trains (*Armstrong Co.* v. *Walling*, 161 F. 2d 515 (C.A. 1), affirming 68 F. Supp. 870 (D. Mass.)). See also *Michell* v. *Airline Foods, Inc.*, 13 WH Cases 140 (E.D. La.) (not otherwise reported) (holding that the "preparation of meals to be furnished to airlines conducting flights in interstate commerce constitutes production of goods for interstate commerce"); *Michell* v. *Royal Baking Co.*, 219 F. 2d 532 (C.A. 5) (holding the Act applicable to employees of a bakery selling part of its goods to a caterer who used them to prepare flight meals for interstate airlines.)

As the Court of Appeals noted (Pet. 23), these decisions "have not been deemed at variance" with *McLeod* v. *Threlkeld*, 319 U.S. 491, which the petitioner characterizes as conflicting with the decision below (Pet. 9). *McLeod*, which held (by a closely divided Court) that an employee preparing meals for railroad maintenance-of-way workers at various points within the same state, was not engaged "in commerce" under the Act.

[2] These decisions were cited with apparent approval in *Alstate*, 345 U.S. at 16, n. 4.

is distinguishable upon several grounds. The decision there dealt only with "in commerce" coverage, not with "the production of goods for commerce," and the meals were served and consumed within the state, whereas the food and beverage prepared by the petitioner's employees actually move across state lines (Pet. 22, 24). Moreover, in *McLeod*, the food was served only for "the personal needs of the maintenance-of-way men" (319 U.S. at 497), whereas, here, as stated by the Court of Appeals, the in-flight service "not only serves the convenience of the passengers but also facilitates the interstate operations of the airlines by obviating the delays incident to the service of meals at the airport" (Pet. 24).[3]

2. The Court of Appeals correctly held the retail establishment exemption inapplicable, and its ruling is not in conflict with the decisions of any other court of appeals. Contrary to the petitioner's assertion, the Fifth Circuit's decision in *Kanowsky, Inc.* v. *Arnold*, 250 F. 2d 47, certiorari granted, May 4, 1959, is not in conflict with the decision below. While we believe *Kanowsky* erroneously applied the exemption

[3] Another independent ground of coverage exists by reason of the employees' duties in removing soiled ovens, carriers and utensils from airplanes landing from other states, in cleaning this flight equipment, and in placing it aboard airplanes departing for out-of-state points. Such handling and working on goods in the course of their interstate movement has been uniformly held to be "in commerce." See *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, affirming 128 F. 2d 395 (C.A. 5); *Airlines Transp.* v. *Tobin*, 198 F. 2d 249 (C.A. 4); *Walling* v. *Rockton & Rion R.R.*, 146 F. 2d 111 (C.A. 4), certiorari denied, 324 U.S. 880; and *Stewart-Jordan Distributing Co.* v. *Tobin*, 210 F. 2d 427 (C.A. 5), certiorari denied, 347 U.S. 1013.

(see memorandum for the Secretary of Labor as *amicus curiae,* in support of petition for certiorari), it involved a factual situation (manufacture of phenolic parts for incorporation into aircraft and "resale" in such *altered* form by the producer of the aircraft assemblies)[4] differing from the situation here. The sales here would *not* qualify for exemption even under the reasoning in the *Kanowsky* case. The test used in the *Kanowsky* case, which distinguishes "wholesale" sales "in large quantity to one who intends to resell" from "retail" sales "in small quantity or direct to the

[4] *Kanowsky* apparently assumed—erroneously, we submit—that a sale in such altered form is not a "resale." The Act defines the term "resale" only in a restricted negative sense to exclude the sale of residential or farm building materials if recognized as retail (Section 3(n), *supra*, p. 2). By clear implication, sales of other property for redistribution, in original or altered form, fall within the meaning of "resale" as used in the Act. The legislative history confirms this implication. In explaining the second test of the "retail establishment" exemption, as set out above, the House Managers' Statement says:

"The second test provides that in order for an establishment to be exempt not less than 75 percent of its annual dollar volume of sales of goods or services (or of both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. *Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form.* In section 3(n) there is a special definition of the word "resale" which is applicable in the case of building materials." (95 Cong. Rec. 14932; emphasis added.)

Similarly, in explaining the meaning of the term "resale" as used in the "retail establishment" exemption provisions, the Statement of the Majority of the Senate Conferees on the Conference Report of the Amendments, as enacted, unequivocally declares that the term "is used in its ordinary sense to include resale in the same or an altered form" (95 Cong. Rec. 14877).

consumer" (250 F. 2d at 50), is entirely consistent with the decision below that the petitioner's sales of a large quantity of flight meals, for redistribution in the same and *unaltered* form to the passengers, are not retail.

The legislative history of the amendment clearly confirms this conclusion. Senator Holland, one of its sponsors, explained that the requirement that 75% of a retail establishment's sales be "not for resale" meant that "at least three-quarters of the goods or services sold must be to the ultimate consumer" (95 Cong. Rec. 12500).[1] Since the petitioner sells flight meals to the airlines "not for self-consumption but for consumption by the passengers" (Pet. 27), who pay for them as "a constituent element for the charge for transportation" (*ibid.*), such sales plainly are not "to the ultimate consumer" but are "for resale." From the point of view of the petitioner, the transaction is the same whether the re-distribution by the airlines is "complimentary" (*i.e.*, included in a higher initial ticket price) or for a specific additional charge over and above the fare.

The petitioner's argument (Pet. 12–13) that the decision below defeats the purpose of the 1949 amendment "to overcome the Administrator's 'business use' test" rests on a misconception of the amendment and confuses two separate statutory requirements. If a retail or service establishment is to qualify for exemption under Section 13(a)(2), 75%

[1] Senator Holland expressly noted that "that statement is a part of the legislative history and record, since we are offering this amendment and are sponsoring it" (95 Cong. Rec. 12501).

of its sales must be (1) "not for resale," and, *in addition,* (2) "recognized as retail sales or services in the particular industry."[6] The first requirement "not for resale" is independent of any consideration of "business use." It was the second requirement, the "industry recognition" test, which was designed to replace the "business use" test (which had been adopted by the Administrator and approved by this Court in *Roland Electrical Co.* v. *Walling,* 326 U.S. 657;[7] see *Mitchell* v. *Kentucky Finance Co.,* 359 U.S. 290). Contrary to the petitioner's apparent assumption, this requirement patently does not mean that *every* sale for business use may be classified as retail.[8] The terms of the exemption, as well as the express legislative intent, plainly preclude classification of sales for

[6] The petitioner inaccurately states (Pet. 13) that the Secretary "conceded" in the Fourth Circuit that 75% of petitioner's annual dollar volume of sales is "recognized as retail sales or services in the particular industry." The Secretary's Brief to the Fourth Circuit stated (Br. 16) that since the petitioner's airline sales were so clearly for resale, defeating the exemption, it was unnecessary to discuss the evidence with respect to "industry recognition." The Reply Brief filed by the Secretary did, however, advance the additional contention that the evidence in the record was inadequate to meet the petitioner's burden of proof on "industry recognition" (Reply Br. 6–9).

[7] The petitioner inadvertently cites this Court's decision as a denial of certiorari (Pet. 13).

[8] In fact, the amendment's sponsors specifically stated that the amendment would not affect the *holding* in the *Roland* case, which involved the sale and servicing of manufacturing machinery and equipment, even though not for resale. Senator Holland, at 95 Cong. Rec. 12505; Statement of the Managers on the Part of the House, 95 Cong. Rec. 14932; Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14877.

resale as "retail," regardless of any "business use" concept.

The other decisions which the petitioner cites as in conflict with the decision below[9] all involve local retail tax statutes. Apart from their impertinence in other respects, State tax decisions, as this Court pointed out in *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 132, "are not particularly helpful in determining the scope of the [Fair Labor Standards] Act." "Translation of an implication drawn from the special aspects" of tax statutes to this "totally different statute" is particularly "treacherous business" (see *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 353) in construing an exemption from this Act. The decision below correctly applied the "well-settled" principle, recently reaffirmed by this Court with respect to the specific exemption here involved, that "exemptions from the Fair Labor Standards Act are to be narrowly construed" without "straining to bring * * * activities within the literal words of the exemption" (*Mitchell* v. *Kentucky Finance Company*, 359 U.S. 290, 295–296).

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[9] *Robertson Products Co.* v. *Nudelman*, 389 Ill. 281, 59 N.E. 2d 655; *Fefferman* v. *Marohn*, 408 Ill. 542, 97 N.E. 2d 785; and *Hotels Statler Co.* v. *District of Columbia*, 199 F. 2d 172 (C.A.D.C.).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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